EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 91-994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RENEE J. WELCH,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

SHELLEY STARK
COUNSEL OF RECORD
ALLEGHENY COUNTY OFFICE OF THE PUBLIC DEFENDER
1520 PENN LIBERTY PLAZA
PITTSBURGH, PENNSYLVANIA 15222
412-392-8403

LESTER G. NAUHAUS
PUBLIC DEFENDER OF ALLEGHENY COUNTY

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

RESPONDENT'S COUNTER STATEMENT OF THE CASE

A. FACTS OF THE INCIDENT MATERIAL TO CONSIDERATION OF THE QUESTIONS.

At approximately 8:00 p.m. on September 2, 1988, two Pittsburgh Police Officers received a radio call to investigate a "tip" that Renee Welch was selling drugs outside her residence. (T.T., 15, 34).[1] The officers knew neither the name of the informant nor the factual basis for the "tip". (T.T., 16). When they arrived at the house, the officers saw no one outside. They saw no activity of any kind. (T.T., 23, 79, 110). The Officers knocked and were admitted to the residence by Clifford and Juanita Rollerfellow, Renee Welch's stepfather and mother. (T.T., 15-16, 80).

The police told the Rollerfellows about the "tip" that Renee was selling drugs outside the house. (T.T., 15-16, 81). The Rollerfellows denied that their daughter had been selling drugs. (T.T., 16, 81). At Mr. Rollerfellow's insistence, the police called their "supervisor" to ascertain who had called the police. (T.T., 16). The officer learned that Kevyn Welch, Renee's brother, had made the call. (T.T., 16, 81-82). Kevyn had moved back into the house a few weeks earlier when he was released from prison. (T.T., 140).

---

[1] "T.T." denotes the "Jury Trial Transcript" dated February 14-17, 1989, and filed in the Certified Record. That same transcript contains the Record of the Suppression Hearing which took place immediately before the trial, T.T., 3-49. Significant portions of the transcript are reproduced and attached hereto as Appendix B1-B14.

Mr. Rollerfellow called Kevyn downstairs and asked him if he had called the police. (T.T., 16, 82). After repeated questioning by Mr. Rollerfellow, Kevyn admitted to having called the police. (T.T., 17, 83). He said that Renee was selling drugs from the house. Id. Mr. Rollerfellow then called Renee downstairs and asked her if Kevyn's allegations were true. (T.T., 17, 112). Renee denied selling drugs. Id. Although Renee denied the allegations and although the officers saw no evidence of drugs or drug related activity, they nonetheless remained in the Rollerfellow residence. (T.T., 89).

The officers asked to search the premises. (T.T., 35). They asked Renee if they could search her bedroom. (T.T., 119). The officers claimed that Mr. Rollerfellow said to Renee, "if you have nothing to hide, why not let them search your room?" (T.T., 17, 18, 88, 119). Mr. Rollerfellow denied that he ever made that statement. (T.T., 40). Irrespective of the conflicting testimony concerning whether or not Mr. Rollerfellow made that statement, the record is clear that at that point, Ms. Welch refused to allow the police to search her bedroom without a warrant. (T.T., 119).

Although the police initially respected Ms. Welch's refusal, they ultimately did search her bedroom shortly thereafter, due to subsequent events. That is, when Ms. Welch refused to allow the search, the police restrained her from returning to her bedroom. (T.T., 18). She went outside and sat on the front porch.

Approximately five minutes later her nine year old nephew, Francisco, went outside and sat with her. (T.T., 113).

Ms. Welch said to Francisco, "go in the house and see what your uncle Kevyn is doing." (T.T., 260). Francisco went upstairs where Kevyn was. (T.T., 113). Mrs. Rollerfellow also went upstairs to use the bathroom. (T.T., 239). While upstairs, Mrs. Rollerfellow saw Kevyn in Renee's bedroom. (T.T., 242). Moments later she heard Francisco and Kevyn running down the stairs. (T.T., 242). Kevyn yelled, "Get him. Get him. He got the dope!" (T.T., 120). The officers grabbed Francisco and a number of small balloons fell out from under his shirt. (T.T., 19, 92). Francisco said, "Oh no, Renee's going to kill me. I screwed up." (T.T., 19). Some of the balloons which Francisco dropped were empty and some contained drugs. (T.T., 202-204).

Francisco then took one officer upstairs to Renee's bedroom. (T.T., 20). Francisco showed the officer a purse "hanging off the nightstand" in Renee's bedroom. Id. The officer testified that Francisco claimed to have taken the drugs from that purse. Id. While in Ms. Welch's bedroom, the officer made a cursory search of the room. Id. Standing next to the nightstand, the officer surveyed the room. The officer saw no drugs or drug paraphernalia in the room. (T.T., 20-21).

Nonetheless, the police arrested Ms. Welch. (T.T., 96). The police testified, "she didn't say anything, she just came with us." Id. When the police took Ms. Welch from the house to

the station, they left the house and Ms. Welch's bedroom unsecured, unobserved, and open. When the officers returned five hours later with a search warrant, they found drugs in plain view in Ms. Welch's bedroom. (T.T., 188). The officers found drugs in plain view in places such as the nightstand where none had been seen by the officer five hours earlier. (T.T., 95, 199).

B. FACTS OF THE TRIAL ERROR AND PRESERVATION OF THE ISSUE.

Throughout Ms. Welch's trial, the prosecutor repeatedly attempted to elicit testimony regarding her refusal to allow the police to search her bedroom. The prosecutor attempted to present this evidence in the case in chief, as substantive evidence of guilt, as well as in cross-examination, to impeach the defense. (T.T., 17, 18, 85-89, 119, 147-148, 273-276; Appendix B1-B14). Some of the prosecutor's numerous attempts to introduce evidence of Ms. Welch's refusal were thwarted by defense objections which the Trial Court sustained. (T.T., 85, 86, 119). However, the Court's rulings were inconsistent and many of the prosecutor's attempts succeeded because at other times the Court overruled the defense objections. (T.T., 87-88, 147-148, 273-276).

Most notably, during cross-examination of Ms. Welch, the Court permitted the prosecutor to use Ms. Welch's refusal to consent to the search, to impeach her. The prosecutor asked Ms. Welch, "Now do you recall, as the police have testified and as Kevyn has testified, that your father or your step-father ...

suggested that if you got nothing to hide ...". (T.T., 273). Defense counsel's objection interrupted the question. The Court overruled the objection and defense counsel asked for a sidebar. (T.T., 274). At sidebar, counsel clearly stated the grounds for his objection:

> MR. SAVOR: I think this is extremely prejudicial, and even if he gets into it, someone asks if you have nothing to hide, why don't you consent to a search, the fact that she exercised her Fourth Amendment rights they're trying to use as evidence against her.

The Court again overruled the objection. The prosecutor then cross-examined Ms. Welch as follows:

> "Q. [BY THE PROSECUTOR] Ma'am do you recall anyone in the house during this confrontation suggesting to you that if you have nothing to hide, let the police look through your room?
>
> A. [BY WELCH] Something to that effect, yes.
>
> Q. You do remember that?
> A. Yes.
>
> Q. And you remember also that you didn't want them looking through your room; is that correct?
> A. Yes.
>
> Q. Now isn't that because you did know that there were drugs up there, and you didn't want the police to find them?
> A. No."

(T.T. 276; Appendix B-14).

Defense counsel preserved this issue in post verdict motions which the Trial Court denied. Ms. Welch then raised this issue,

inter alia, on direct appeal.[2] The Superior Court of Pennsylvania reversed the conviction holding, "it was error to allow testimony regarding her refusal of a search of her bedroom in the absence of a warrant." 585 A.2d at 518, Appendix A.

Further, contrary to the Commonwealth's assertion in its Petition for a Writ of Certiorari, Superior Court did rest its decision on alternative state grounds, abuse of discretion:

> Regardless of whether such testimony is inconsistent with the constitutional protection we would find an abuse of discretion in allowing the evidence in any event. It is hornbook law that evidence will be considered inadmissible if its prejudicial effect outweighs its probative value. We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence.

585 A.2d at 520; Appendix A, emphasis supplied.

---

[2]Because of its ruling on this issue, Superior Court did not address the seven other errors raised in Mrs. Welch's brief.

The Commonwealth filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. That Petition raised only the question of violation of the Federal and State Constitutions and whether such an error could be harmless. That Petition did not raise or include any issue challenging Superior Court's alternative basis for its decision, the abuse of discretion by the Trial Court.

The Pennsylvania Supreme Court denied review. Therefore, the opinion at issue herein is that of the Superior Court of Pennsylvania, the intermediate appellate court, hereinafter, Superior Court.

REASONS FOR DENYING THE WRIT

A. SUPERIOR COURT'S DECISION WAS GROUNDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS; ANY DECISION RENDERED BY THIS COURT WOULD THEREFORE BE ONLY ADVISORY.

Petitioner has seriously misrepresented Superior Court's Opinion. That decision was alternatively based on adequate and independent state grounds. California v. Freeman, 488 U.S. 1311, 109 S.Ct. 854, 856 (1989). Superior Court specifically held that admission of the evidence regarding Ms. Welch's refusal to allow a search of her bedroom, constituted an abuse of discretion by the Trial Court. 585 A.2d at 520; Appendix A. That abuse of discretion necessitates a new trial "regardless of" any constitutional violation. Id. Superior Court would render the "same judgment" even if this Court "corrected its view of federal law". Michigan v. Long, 463 U.S. 1042, 103 S.Ct. 3469, 3477 (1983). Therefore, any opinion issued by this Court would be "nothing more than an advisory opinion" which is "not permitted". Freeman, 109 S. Ct. at 856; Long, 103 S.Ct. at 3477. Because of Superior Court's "plain statement" that the "decision rests on adequate and independent state grounds", this Court lacks jurisdiction to decide this case. Id.

B. THE PETITION FAILS TO PRESENT ANY GROUNDS JUSTIFYING THIS COURT'S REVIEW.

Nor has the Commonwealth asserted or met any of the established criteria for granting review. U.S. Sup. Ct. Rule 10, 28 U.S.C. The Commonwealth failed to establish "special and important reasons" which would justify issuance of a Writ of Certiorari under Rule 10. The Commonwealth has not shown that Superior Court's Opinion conflicts with "applicable decisions of this Court". Rule 10.1(c). On the contrary, Superior Court's Opinion is fully supported by the applicable decisions of this Court, [Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102 (1987), Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634 (1986) and Doyle v. Ohio, 426 U.S. 616, 96 S.Ct. 2240 (1976)], which the Commonwealth failed to distinguish.

Nor has the Commonwealth accurately presented an "important question of federal law" which this Court should settle. Rule 10.1(c). Rather, the Commonwealth has contorted the issue by misrepresenting Superior Court's Opinion. The Commonwealth claims that the Opinion would somehow require police to inform a suspect of his right to refuse a warrantless search. (Petition at 19-23, 34-35) Superior Court's Opinion does not address that issue. Ms. Welch never made that claim or raised that issue. Not only is that issue non-existent, it is irrelevant. Whether or not the police tell a suspect of his right to refuse a search is irrelevant to the issue herein. This case has nothing

whatsoever to do with warnings given by the police. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) is therefore in no way implicated or relevant to the issue herein.

Petitioner misperceives the error herein. The error which led Superior Court to reverse the conviction was not created by the words or actions of the police.[3] Rather this error occurred at trial and was caused by the Assistant District Attorney, by his exploitation of Ms. Welch's refusal to allow a search. The Trial Court allowed the prosecutor to introduce the evidence in his case in chief, to prove guilt. The Court then allowed the prosecutor to impeach Ms. Welch with her refusal to allow a search. These trial errors led Superior Court to reverse, not the failure of the police to warn Ms. Welch of her right to refuse a search.

Not only has the Commonwealth misperceived the issue herein, but the Commonwealth also misperceived this Court's holding in South Dakota v. Neville, 459 U.S. 569, 103 S.Ct. 916 (1983). Neville, like Schneckloth, is simply not relevant to the issue at hand. In Neville this Court declined to apply the rule of Doyle because the challenged evidence did not concern the Defendant's invocation of a constitutional right. Rather, Mr. Neville, suspected of drunk driving, refused the blood-alcohol test. Insofar as the taking of blood from a DUI suspect does not

---

[3]Ms. Welch did challenge the legality of the police actions and their search of her room, but in a separate issue in her appeal. Superior Court did not address that issue because of its holding that admission of the evidence at trial necessitates a new trial.

implicate the Fifth Amendment, [Schmerber v. California, 384 U.S. 757, 866 S.Ct. 1826 (1966)], no constitutional right is involved. Therefore, evidence of a refusal to take the test is admissible and constitutionally unoffensive. 103 S.Ct. at 923. In contrast, it cannot be disputed that a police search of a private bedroom implicates Fourth Amendment rights. See Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980).

In addition, the Commonwealth never proved that the police had probable cause to search the bedroom at the time of Ms. Welch's refusal. On the contrary, the parties, including the police; believed that at the time of Ms. Welch's refusal, the police could not search her bedroom unless she consented. (T.T., 17-18). Particularly given that the Commonwealth failed to prove that the Fourth Amendment allowed a search of Ms. Welch's room at the time of her refusal, Superior Court's Opinion in no way conflicts with Neville.

Nor has the Commonwealth presented any conflict among the Circuits which may warrant the grant of certiorari. On the contrary, the Commonwealth concedes that in a strikingly similar case, U.S. v. Prescott, 581 F.2d 1343 (9 Cir. 1978), the Ninth Circuit held precisely as did Superior Court herein:

> Because the right to refuse entry when the officer does not have a warrant is equally available to the innocent and the guilty, just as is the right to remain silent, the refusal is as "ambiguous" as the silence was held to be in United States v. Hale, 1975, 422 U.S. 171, 176, 77, 95 S.Ct. 2133, 45 L.Ed.2d 99. Yet use by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective-

> to induce the jury to infer guilt. In the case of the silence, the prosecutor can argue that if the defendant had nothing to hide, he would not keep silent. In the case of the refusal of entry, the prosecutor can argue that, if the defendant were not trying to hide something or someone . . . she would have let the officer in. In either case, whether the argument is made or not, the desired inference may be well drawn by the jury. This is why the evidence is inadmissible in the case of silence. United States v. Hale, supra, 422 U.S. at 180, 95 S.Ct. 2133; Doyle v. Ohio, 1976, 426 U.S. 610, 617 fn. 8, 96 S.Ct. 2240, 49 L.Ed.2d 91; Grunewald v. United States, 1957, 353 U.S. 391, 421-24, 77 S.Ct. 963, 1 L.Ed.2d 931. It is also why the evidence is inadmissible in the case of refusal to let the officer search.
>
> 581 F.2d at 1352 emphasis supplied.

The only Circuit opinion offered by the Commonwealth to counter Prescott is U.S. v. McNatt, 931 F.2d 251 (4th Cir. 1991). However, McNatt addressed a different error and different factual circumstance than existed herein and in Prescott. In defense counsel's closing argument in McNatt, counsel claimed that the police had planted the drugs in the defendant's car. 931 F.2d at 257. In rebuttal to that factual argument, the U.S. Attorney argued that the search which the Defendant had refused to allow, would have established or refuted that serious charge. Therefore, the defense opened the door, necessitating the government's three-sentence argument in rebuttal. Id. "The government did not argue that appellant's refusal supported an inference of guilt, but only that it was inconsistent with the claim that the evidence had been planted." Id., (emphasis supplied).

In contrast, the Commonwealth did use Ms. Welch's refusal to consent, to support an inference of guilt. The Commonwealth used the evidence both in its case in chief and on cross-examination to prove Ms. Welch's guilt, not to rebut a factual claim as in McNatt. Not only was the evidence admitted for a different purpose than it was in McNatt, but the evidence concerning Ms. Welch's refusal to consent differs significantly from the substance of the evidence in McNatt. That is, the police did search Ms. Welch's room shortly after her refusal and despite her refusal. During that search the police saw no drugs in her room. Ms. Welch's defense was that her brother planted the drugs. Her defense was in fact supported by the search conducted without her consent: the police saw no drugs in her room during that initial search, yet they saw drugs in plain view when they returned five hours later. During that five hour interim, her bedroom was unsecured and open to anyone, including her brother.

Thus, not only was the error in McNatt different, but the facts of McNatt were significantly different from those herein and in Prescott. McNatt, then, conflicts neither with Prescott nor with Welch. Insofar as the Commonwealth has presented no conflict between or among the Circuits regarding the issue herein, certiorari is not warranted.

Finally, the Commonwealth not only failed to demonstrate a conflict between the Opinion herein and any applicable decision of this Court or of a Circuit, but the Commonwealth failed to cite any conflict between the Opinion of Superior Court and any

opinion of a "state court of last resort". Rule 10.1(b). On the contrary, the Commonwealth cited two state Supreme Court Opinions which held exactly as Superior Court did herein: Gracia v. State, 103 N. M. 713, 712 P.2d. 1375 (1986); Padgett v. State, 590 P.2d 432 (1979). Insofar as those Opinions completely support this decision, certiorari is not warranted.

CONCLUSION

Adequate and independent state grounds fully supported Superior Court's Opinion, rendering any opinion of this Court regarding the Fourth Amendment, advisory. Not only does this Court therefore lack jurisdiction to decide this case, but the Commonwealth has presented no grounds which would justify this Court's review. Ms. Welch asks this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

By Shelley Stark

Shelley Stark
Chief-Appellate Division
Attorney of Record

Lester G. Nauhaus
Public Defender

Attorneys for Respondent

COMMONWEALTH of Pennsylvania

v.

Renee WELCH a/k/a Allyson Renee Welch, Appellant.

Superior Court of Pennsylvania.

Submitted Sept. 17, 1990.
Filed Jan. 23, 1991.

Defendant was convicted in the Court of Common Pleas, Allegheny County, No. 8810301A, McDaniel, J., of drug charges and she appealed. The Superior Court, No. 1153 Pittsburgh 1989, Brosky, J., held that: (1) it was improper to admit evidence that defendant had refused to consent to search of her bedroom, and (2) evidence that she had refused to consent was not probative of the fact that the items which the police suspected were present were actually present.

Vacated and remanded.

Kelly, J., concurred in the result.

1. **Criminal Law** ⇐351(1)

It was error to admit evidence that defendant had refused consent to a search of her bedroom in the absence of a warrant.

2. **Criminal Law** ⇐338(7)

Evidence will be considered inadmissible if its prejudicial effect outweighs its probative value.

APPENDIX A

3. Criminal Law ⇐351(1)

Refusal to allow the police to search one's bedroom without first producing a warrant is not probative of the fact that the items which the police suspect are present are actually present.

Shelley Stark, Public Defender, Pittsburgh, for appellant.

James R. Gilmore, Asst. Dist. Atty., Pittsburgh, for Comm., appellee.

Before OLSZEWSKI, KELLY and BROSKY, JJ.

BROSKY, Judge.

This is an appeal from a judgment of sentence imposed upon appellant after she was convicted on drug charges. Appellant raises eight issues for our consideration including an argument that it was error to allow testimony regarding the appellant's refusal to allow a search of her room without a warrant. Because we find this issue meritorious we vacate the judgment of sentence and remand for a new trial.

Briefly stated, the facts as they were related at trial and not seriously disputed are: in response to a radio message that an individual named Renee Welch was selling drugs from a certain address, the police went to the described address and knocked on the door. At that time the police spoke with appellant's mother and stepfather about the nature of the visit. Upon learning that the police suspected their daughter of selling drugs they inquired where the information came from. The police checked with the station and were told that there had been a call from appellant's brother, who also lived at the same address, implicating appellant. Upon hearing this appellant's stepfather called appellant's brother down from upstairs and confronted him with this information. At first the brother denied making the call but he then admitted it and went on to describe facts implicating appellant in drug selling activity. Appellant was then called downstairs and also confronted with the allegations which she denied. At that point, it was suggested by someone that if the allegations were false then she ought to allow the police to inspect her room. Appellant refused indicating that she would not allow a warrantless search of her bedroom.

Additional discussions took place during which appellant's nephew came down the steps from the floor containing appellant's bedroom. Appellant's brother then chased the nephew down the steps and yelled "stop him, he's got the drugs" at which time several balloons later found to contain narcotics fell from the nephew's shirt. In response to finding these balloons the nephew was instructed by appellant's mother to take the police upstairs and show them where he got them from. Eventually a search warrant was obtained at which time additional evidence was seized. At trial, one of the officers began testifying to the events as they transpired. As the officer began testifying to appellant's comments regarding searching her room, an objection was lodged and a sidebar discussion ensued. After hearing arguments of both counsel the officer was allowed to continue testifying at which time the appellant's refusal to allow a search absent a warrant was related.

[1] Appellant argues that it was error to allow testimony regarding her refusal of a search of her bedroom in the absence of a warrant. Counsel made such an argument and in addition to arguing that it was improper to have her refusal used against her, counsel also indicated that the prejudice would greatly outweigh any probative value. We are inclined to agree that it was error to allow such questioning.

It is asserted by appellant's counsel that research of this issue has revealed no cases where the specific issue before us has been decided. Because we believe this issue is analogous in significant respects to the invocation of one's right to silence, we rely upon the cases discussing this issue.

In *Commonwealth v. Haideman*, 449 Pa. 367, 296 A.2d 765 (1972), our Supreme Court held that it was reversible error to admit evidence of an accused's request for counsel and silence at arrest. At the time *Haideman* was decided it was the more

prominent view that such evidence was an impermissible impairment upon one's Fifth Amendment right against self incrimination. For instance, in *Fowle v. United States*, 410 F.2d 48 (9th Cir.1969), the Ninth Circuit Court of Appeals stated,

> We simply cannot adopt an interpretation of the Fifth Amendment under which one exercising his right to remain silent upon and immediately after his arrest—a right which the Supreme Court has so earnestly sought to guarantee and preserve—is severely prejudiced by his recourse to that cherished right. It would be anomalous indeed if honorable law enforcement officers were required to elaborate upon the traditional fifth amendment warning and advise arrested persons, in effect: If you say anything it may be used against you. You have the constitutional right to remain silent, but if you exercise it, that fact may be used against you.

The Seventh Circuit Court of Appeals made similar observations stating, "[t]he testimony elicited here could well have led the jury to infer guilt from defendant's refusal to make the statement. We think exercise of a constitutional privilege should not incur this penalty." *United States v. Kroslack*, 426 F.2d 1129, 1130–31 (7th Cir.1970). Although in the present case we are dealing with an assertion of a different constitutional right, the freedom from warrantless searches, we feel the same reasoning must apply to the assertion of that right.

As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right, the overriding tone is that it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt. To allow such testimony essentially puts the individual in the same kind of no win situation that would exist if the above outlined decisions were to the contrary. With respect to the Fifth Amendment, one would be forced to choose between speaking after arrest at the expense of possibly incriminating himself, or refusing to speak and having this fact brought up at trial, thereby inferentially incriminating himself. With respect to a search, one would have to choose between allowing a search of one's possessions, or having the refusal be construed as evidence that one was hiding something. To the extent an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.

The Commonwealth argues that the cases regarding the Fifth Amendment right of silence should not be applied analogously to the present case as the Fourth Amendment right is not an absolute one, but only a qualified one. The argument continues asserting that one has an absolute privilege of silence but not an absolute right not to be searched. We find this argument unavailing. Although one may not have an absolute right not to be searched the guarantee of the Fourth Amendment is no less absolute. It protects one from unreasonable searches and seizure. This protection is just as absolute as the right to remain silent, although it may require more case-by-case definition or exposition. However, even the Fifth Amendment has required much development by caselaw and has several nuances. For instance, the amendment itself does not indicate one can invoke the right at the time of arrest and at any point thereafter, rather, this premise has been developed through caselaw. Similarly, the per se unreasonableness of warrantless searches, absent certain policy exceptions, has been firmly ensconced in our constitutional caselaw history.

Although certain occasions may develop where a warrantless search is allowable, the general proposition that a warrant is necessary still prevails and, we think, is as absolute as the right to remain silent. In any event, we think this argument is very misguided. The point of significance is that one should not be penalized for *asserting* a constitutional right. It is the assertion of a right that we must focus on. We believe that the assertion of a right cannot be used to infer the presence of a guilty conscience. Thus, the actual entitlement to the right could be thought of as irrelevant to the point we are discussing. We would think that the same reasoning would apply even if the individual asserting the right had a mistaken belief that they were protected by a constitutional provision or were extended a right or protection when, in fact, they were not. The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt.

[2, 3] Regardless of whether such testimony is inconsistent with the constitutional protection we would find an abuse of discretion in allowing the evidence in any event. It is hornbook law that evidence will be considered inadmissible if its prejudicial effect outweighs its probative value. We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence. However, apparently all involved in the present case agree that a jury is likely to infer this fact from the refusal. Indeed, the Commonwealth seems to argue that this is inferable from

usal. The district attorney states in ef presented to this court "the infer- hat appellant was hiding something ne superseding basis for relevancy ls to show appellant's scienter." onwealth's brief, at page 66. As the Circuit Court of Appeals argued, would be naive if we failed to recog- at most laymen view an assertion of th Amendment privilege as a badge t." *Walker v. United States*, 404 00, 903 (5th Cir.1968). We believe me effect would follow from one's to allow a search of one's residence ssessions. Thus, the trial court have prevented this line of question- nen a timely objection was made.

the above reasons we believe it was ble error to allow the testimony re- g appellant's refusal to consent to a in the absence of a warrant. There- e vacate the judgment of sentence mand for a new trial.

ment of sentence vacated, remanded new trial. Jurisdiction is relin- d.

LY, J., concurs in the result.

Q All right. What happened after that?

A I believe the Rollerfellows called Renee downstairs then and asked her if this was true, and she denied it; and Mr. Rollerfellow said, "Well, if it's false, then let these policemen go upstairs and check your room. Let them go up and look because Kevyn said she has stuff up there right now. You can go up there and look," and Renee said, "No. If you don't have a search warrant, you can't go up to my room."

And at that point we didn't want to go up

without a search warrant since she said that she didn't want us to go up there, but Mr. Rollerfellow said to her, "Well, then you must have something to hide if you will not let these policemen go upstairs. If you have nothing to hide, you don't have to be worried about them going up there."

Renee wanted to go back up to her room, and my partner said, "No. You can't go up there. You're going to have to stay out of the room until we get a search warrant," and so she left the house.

The nephew, Cisco they called him, was sitting on the love seat the whole time watching TV while we were standing there listening to this argument going on between the family --

Q When you say Cisco, do you know Cisco's full name?

A Francisco Martinez.

Q Go ahead.

A And he got up while we were standing there, and he went out of the front door right after Renee; and shortly afterwards he came back in the house, and he went upstairs, and in the meantime we were speaking to the Rollerfellows about what we could possibly do for them and what would happen -- you know, where we could recommend that they get some help and that they could talk to our plainclothesmen and the drug detectives and see if this

anything more to this; and I guess it's that kind of feeling that you know that there may be some truth to it but you don't really want to admit that there is any truth to it, and Kevyn said, "Well, ask her. Just ask her. Call her down here. Ask her. Ask her what she's doing."

MR. SAVOR: I'm going to object to the hearsay nature of this testimony.

THE COURT: I'll sustain the objection.

Q Was Renee called down at that point?

A Yes. They called her downstairs, and she came from upstairs where the bedrooms are down to the first floor where we were all having this discussion; and Mr. Rollerfellow said --

MR. SAVOR: I'm going to object again to the hearsay nature, Your Honor.

THE COURT: I'll sustain the objection.

Q Can you tell us did anyone present confront Renee with the allegations against her? And I'm only trying to get at what, if anything, her reaction was to being confronted with those allegations.

A Yes. When they asked her if she was selling drugs, if this was true --

MR. SAVOR: Again, Your Honor, all these witnesses are here and available to testify. She is certainly not the person to relate anything they

said.

MR. FITZSIMMONS: Your Honor, if the Defendant gave a reaction to what was being stated to her at that point either orally or nonverbally, I think that is evidence that can be used against her, and that's all I'm trying to elicit. I'm not offering statements made by others for the truth of those matters, but only to give context to the reaction or statement --

THE COURT: Okay. I'll allow the statement on that limited basis, Mr. Fitzsimmons.

MR. FITZSIMMONS: Thank you, Your Honor.

A She looked at her brother and her parents and just acted like she wasn't really involved, and her stepfather said, "Well, if it's not true" --

MR. SAVOR: I object again to this, Your Honor. I mean a minute ago we were into the -- any admissions the Defendant made. Now we're talking about statements that the grandparent might have made or stepfather. He's certainly here. He's got his ability to testify.

THE COURT: I'll sustain the objection.

Q Let me ask you this, ma'am. Did anyone present there suggest to Renee that she permit inspection of her room to disprove these allegations?

A Yes, they did.
Q And what was her reaction to that?
A She said no, that we couldn't get to her room --

MR. SAVOR: I object. Excuse me, Your Honor. Can I have a sidebar for a moment?

- - -

(Sidebar conference as follows:)

MR. SAVOR: Your Honor, she's going to testify that the Defendant refused to allow a search without a warrant. That is certainly prejudicial for the limited use here.

Someone is going to assert their right not to be searched without a warrant, and they have to have it used against them in court? That is extremely prejudicial. I mean how can one assert their rights if a police officer is going to be allowed to come in and say, no, she wouldn't let us search without a warrant and the jury has to hear that?

MR. FITZSIMMONS: Your Honor, I don't believe it's prohibited. Obviously the defense can cross-examine on this point. The Defendant if she chooses can explain her actions at that point. I believe it's permissible --

MR. SAVOR: How can anyone assert their Fourth and Fifth Amendment rights if they're going to be

brought back and tell the jury --

THE COURT: It's clear the police cannot make any reference to her choice to remain silent, Fifth Amendment; but I don't know of any case law that says -- that apply to the Fourth Amendment rights. I will allow the statement.

MR. SAVOR: Excuse me for one second. I don't see how it's relevant that she denied letting them search. All they're asking is would they let you search the place? I mean it's very prejudicial, and there's no probative weight there whatsoever.

MR. FITZSIMMONS: It bears upon her intent, her knowledge. Absolutely.

THE COURT: I'll allow the statement. Your objections are on the record.

- - -

(In open court, jury present:)

BY MR. FITZSIMMONS:

Q Ma'am, the last question, can you answer that and complete your response?

A Could you repeat the question?

Q Yes. I believe you had related that someone suggested that to refute these allegations, she should consider allowing you officers to search her bedroom, and I asked you what her response or reaction was to that suggestion.

A She was against it. She --
Q Now -- okay. Go ahead. If you didn't complete your answer, go ahead.
A She looked at us and said, "No. I don't have to. If you don't have a search warrant, you can't go up to my room."
Q At that point after she said that, did you continue to remain there and to investigate the allegations that had been made?
A At that point we really didn't even have time to make a decision because her stepfather continued on, pressing us to do something. I think he felt like his whole house was in turmoil --

MR. SAVOR: I object to what she might think the stepfather was feeling.

THE COURT: I'll sustain the objection.

A Anyway, he asked us what he could do, and he wanted to know where they could go from there. If Renee had a problem or if there was some trouble, he didn't want this going on in his house.

He told us that his wife was very visible in the community and involved in community activities, and it would be terrible for their daughter to be selling drugs right under their very noses, and he wanted something done about it. He wanted to know what we could do about it.

We spoke with our plainclothesman on the radio.

until we get this thing straightened out."

So she sat on the couch, and Mr. Rollerfellow was very insistent that he wanted to get to the bottom of this. He wanted to find out what was going on in his home. "This is my home. I want to know what's going on," and very insistent that we and everybody -- "Let's get this thing straightened out."

So we were kind of monitoring everything at that time, finding out -- we're trying to find out what was going on and see if these allegations were true or not, and this went on for quite a while, and then Renee says -- we asked her if we could go up and check her room out after Mr. Rollerfellow said "Well, if you have nothing to hide, why don't you go up there" --

MR. SAVOR: Your Honor, I object to the hearsay.

THE COURT: I'll sustain the objection.

Q Were you permitted at that time to go up there, sir?

A No.

Q Did Renee remain at the house after that point?

A No. She started to walk out the door. I was standing right at the door, and the nephew, Francisco Martinez, was sitting on a little -- like a little couch. He was watching TV, kind of completely oblivious to everything that was going on. She kind of bent over and said something to him -- I don't know what it was -- and walked

brought them down and showed them to the officers and Clifford, and then the officers told them that they could possibly be used for, you know, packaging drugs of various --

Q Where did you get those balloons from, sir?

A From her room, off her dresser.

Q From whose room?

A Renee's room.

Q What happened after that point, sir?

A After that point -- well, during this point sometime Renee had come into the house from outside, and I said, "There she is. There she is, right there. Ask her, right," and the police went and confronted Renee because she -- and then she denied it, and then she attempted to go up the stairs, and they told her, "No. You can't go upstairs."

So she went and sat down in a chair in the living room. Me and her were having words back and forth throughout the whole thing while the police were talking to my parents. She was saying, "I didn't know you hated me this much. You dog. You dog. I don't know why you hate me this much. I didn't think you hated me this much."

The police were deciding on whether they should call another officer or someone to see about getting a search warrant for her room because Renee had denied them

access to her room, and then they were deciding on the legality of whether my mother and Clifford could give them permission to search her room being that the house was in -- the lease was in their name; and so we just basically waited, you know, for a period of time.

Renee had got up to leave, and at some point in time Cisco had come in the house I guess out of curiosity of what was going on, and he was sitting on the love seat; and as Renee got up to leave, she bent over, said something to him, and she left out. About five minutes later Cisco left out of the house.

My mother walked upstairs. Cisco came in the house while my mother was walking upstairs, and he went upstairs. I went upstairs to talk to him because, you know, to try and explain to him what was going on --

Q To talk to Francisco?

A Yeah, and while I was in my room I noticed that he wasn't in his room -- you know, in the room, because he usually, you know, would go into the room and sit around and watch television --

Q This is your room you're talking about?

A Yeah, the room that I stay in.

Q Did he have his own space, so to speak?

A Yes. He had his own space downstairs.

Q On the first floor?

bed (indicating). My door is right here (indicating). So if it was my nightstand, I would have to look like back this way (indicating).

Q So there may have been drugs sitting there or maybe they weren't?

A They may have and maybe not.

Q They certainly weren't yours?

A No.

Q You go downstairs, and you're confronted with this allegation; is that right?

A Correct.

Q Now, when you're standing downstairs, did you have any reason to believe that there was any drugs up in your bedroom?

A After I was confronted, after I was confronted with the question and they had said that Kevyn had called and said that there was drugs up in there, I didn't know. I had no idea actually.

Q I'm saying did you have any knowledge or any belief that there was any drugs up in your bedroom when you were confronted with that allegation?

A No.

Q Now, do you recall as the police have testified and as Kevyn has testified that your father or your stepfather -- I'm sorry -- suggested that if you got nothing to hide --

MR. SAVOR: Excuse me, Your Honor, I think we're assuming facts not in evidence. There's been no testimony presented to this; and I believe what Mr. Fitzsimmons is referring to --

THE COURT: I'll overrule the objection. You may finish --

MR. SAVOR: Can we have a sidebar, Your Honor?

- - -

(Sidebar conference as follows:)

MR. SAVOR: I think what you were going to ask was if Mr. Rollerfellow said, "Well, if you got nothing to hide, let them go up and look"; right?

MR. FITZSIMMONS: You got it. Of course, if you had waited until I finished, you would know.

MR. SAVOR: I understand that, but the question was prejudicial. Officer Degler testified to that at the suppression hearing. She never testified to that during this trial. He never asked her about that. She never said anything about what Mr. Rollerfellow said. After I objected to that sort of thing being hearsay, he didn't pursue that line of questioning, and I'm positive on the matter. It's not in the transcript.

THE COURT: I don't remember. I honestly don't remember whether -- I know that testimony has been

entered, but I can't state if --

MR. FITZSIMMONS: Well, I know it came out of the mouth of Kevyn Welch.

MR. SAVOR: He never said that either. Nothing to that effect has ever been said after the suppression hearing; and even if it was, I guarantee you if we look through, it's not in there. Even if it was --

MR. FITZSIMMONS: But it's there. I know it's there. Kevyn said that just this morning.

THE COURT: Would you like to review the testimony?

MR. SAVOR: The only problem I have with that --

THE COURT: Can we go off the record?

(A sidebar discussion was held off the record.)

MR. FITZSIMMONS: At this point all I want to ask is if she remembers being -- that being suggested by Mr. Rollerfellow. I mean if she does, then obviously there is that follow-up question. If she doesn't, then that's the end of the inquiry.

MR. SAVOR: I think this is extremely prejudicial, and even if he gets into it, someone asks if you have nothing to hide, why don't you consent to a search, the fact that she exercised her Fourth Amendment rights they're trying to use as

evidence against her. Now, I think it's extremely prejudicial, and I wish I had a case on hand to cite. I am sure there are some.

THE COURT: Your objection will be noted, Mr. Savor.

- - -

(In open court, jury present:)

BY MR. FITZSIMMONS:

Q Ma'am, do you recall anyone in the house during this confrontation suggesting to you that if you have nothing to hide, let the police look through your room?

A Something to that effect, yes.

Q You do remember that?

A Yes.

Q And you remember also that you didn't want them looking through your room; is that correct?

A Yes.

Q Now, isn't that because you did know that there were drugs up there, and you didn't want the police to find them?

A No.

Q Shortly thereafter you left and you went outside; is that correct?

A Yes.

Q Where were you going?

A I just went outside to sit down on the steps, sit down on

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMONWEALTH OF PENNSYLVANIA Petitioner	:	
v.	:	No. 91-994
RENEE J. WELCH Respondent	:	

PROOF OF SERVICE

I, Shelley Stark, Chief-Appellate Counsel, of the Office of the Public Defender do hereby certify that a true and correct copy of the within Brief has been served upon opposing counsel, Kemal A. Mericli (412-355-4377).

Respectfully submitted,

Lester G. Nauhaus
Public Defender

By Shelley Stark
Shelley Stark
Chief-Appellate Counsel
(412-392-8403)

Date: February 14, 1992